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PERSONS WHO ARE NOT "PERSONS": ABSOLUTE INDIVIDUAL IMMUNITY UNDER SECTION 1983

Sheldon H. Nahmod*

Suits brought under section 1983 of title 42 of the United States Code have provided additional protection of constitutional rights. Recently, the use of this statute has increased markedly resulting in new areas of controversy. In this Article, Professor Nahmod examines the issue of absolute individual immunity under section 1983. He explores the doctrine's historical background, the distinction between actions for damages and injunctions, and projects the doctrine's effect on certain individuals in the future.

Section 1983 of Title 42 of the United States Code, a powerful constitutional "sword" for plaintiffs, makes "persons" liable for violations of the Fourteenth Amendment.¹ Its broad facial language admits no exceptions. Yet until recently local governmental entities were considered by the United States Supreme Court not to be "persons" and thus not liable under the statute's provisions.² More surprisingly, certain individuals who are clearly "persons" in the common understanding of that term have been given an absolute immunity from liability for damages under 1983.³ The purpose of this Article is to examine and analyze who is entitled to this immunity.

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1. The section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970). For a discussion of relationship between § 1983 and the Fourteenth Amendment, see generally Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 1 (1974) and A GUIDE TO SECTION 1983 chapters 2 & 3. Liability under the "laws" is beyond the scope of this Article. See A GUIDE TO SECTION 1983 chapter 2.

2. *Monroe v. Pape*, 365 U.S. 167, 191 (1961) (holding that municipalities are not "persons" within section 1983), *overruled in* *Monell v. Dep't of Soc. Serv.*, 98 S. Ct. 2018, 2041 (1978) (holding that local governments are "persons" for purposes of section 1983). See also *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

3. The emphasis is intentional. As stated in *Rowley v. McMillan*, 502 F.2d 1326, 1331 (4th Cir. 1974): "the doctrine of immunity . . . has no application to a suit for declaratory or injunctive relief" See the discussion in notes 52-55, 124-133, 178-180 and accompanying text *infra*.

The difference between absolute and qualified immunity is of immense practical significance for the individual. No inquiry into the absolutely immune defendant's state of mind is permitted, while qualified immunity, an affirmative defense, necessitates such an inquiry after the plaintiff has made out a 1983 cause of action.⁴ Typically, an action against an absolutely immune defendant will be dismissed on motion which simply sets out his status and his having acted within his official capacity.

The Supreme Court to date has established three classes of absolutely immune individual defendants: state legislators,⁵ judges,⁶ and prosecutors.⁷ This Article will deal with the Court's reasoning in the leading cases, and consider its implications. It will also explore the scope of absolute immunity, and analyze the use made by the circuits of the Court's decisions. As will be seen, certain line drawing problems emerge which are not alleviated, especially in judicial immunity cases, by the Court's use of jurisdictional terminology.

LEGISLATIVE IMMUNITY FROM LIABILITY FOR DAMAGES:

TENNEY V. BRANDHOVE

The Supreme Court first established an absolute immunity for persons from section 1983 actions in *Tenney v. Brandhove*.⁸ The plaintiff sought damages under section 1983 against various individuals, including the members of the California Senate Fact-Finding Committee on Un-American Activities. He claimed they had intimidated him in the exercise of his constitutional rights by wrongfully interrogating him and prosecuting him for contempt in the course of their investigation. The Court, per Justice Frankfurter, held that state legislators have an absolute immunity from liability for damages when they act "in a field where legislators traditionally have power to act. . . ."⁹ Characterizing the Committee's investigation as within those bounds,¹⁰ the Court found the Committee's members absolutely immune despite a claim of "unworthy purpose."

4. *Wood v. Strickland*, 420 U.S. 308 (1975). The Court stated that the qualified immunity test contains both objective and subjective elements and held that

a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

Id. at 322. See generally A GUIDE TO SECTION 1983 chapter 8.

5. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

6. *Pierson v. Ray*, 386 U.S. 547 (1967).

7. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

8. 341 U.S. 367 (1951).

9. *Id.* at 379.

10. The Court noted:

Investigations, whether by standing or special committees, are an established part of representative government

To find that a committee's investigation has exceeded the bounds of legislative

The Court's reasoning is worth noting. It interpreted 1983's "person" language against a common law background of absolute legislative immunity from tort liability derived from English law and early American history. The Court also emphasized the policy underlying the Speech or Debate clause of the United States Constitution,¹¹ suggesting that it "was a reflection of political principles already firmly established in the States."¹² Against this background the Court examined the legislative intent behind 1983 and concluded that it would be implausible to infer that Congress intended to overturn the historical tradition of legislative freedom by subjecting legislators to civil liability for acts performed while engaging in legislative activity.¹³ The Court noted: "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."¹⁴

Despite the broad language of section 1983 and Justice Douglas' dissent,¹⁵ the result in *Tenney* is probably justified for its concern with the democratic process and the chilling effect potential litigation might have upon the independence of legislators. *Tenney* prevents any inquiry into legislative motive, no matter how allegedly corrupt, so long as the legislator is acting in a traditional legislative field. Thus, the remedies for such corruption must be the political process and the criminal laws.¹⁶

While *Tenney* establishes that legislators are absolutely immune from section 1983 damages liability under appropriate circumstances, it fails to delineate what those circumstances might be and what acts of such an individual are protected. *Tenney* tells us that a legislative committee's investigation is within the field to which absolute immunity attaches,¹⁷ but it does not address the question of whether legislative employees or local legislatures such as city councils are within the sphere of absolute immunity. *Tenney* also gives no real indication of the standards which courts should use in distinguishing between traditional and nontraditional legislative fields. Finally, and more generally, *Tenney* leaves open the question of which other governmental officials might be absolutely immune because of a similar background of absolute immunity.

power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation. *Id.* at 377-78.

11. U.S. CONST. art. I, § 6.

12. *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951).

13. *Id.* at 376.

14. *Id.*

15. He argued that "when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends." *Id.* at 383. His argument appears in effect to be for a qualified immunity, although he never used that term.

16. "[W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights." *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). See also *Gravel v. United States*, 408 U.S. 606, 627 (1972).

17. *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

State Legislators and Protected Legislative Conduct

Once the defendant's status is found to be that of a state legislator, the next issue is whether the challenged act is legislative in nature. The extreme cases are relatively easy to deal with. At one extreme the act of a state legislator in driving negligently and injuring another is not a legislative act and, moreover, it may not even be an act under color of law.¹⁸ At the other extreme is the situation in which the state legislator is sued under section 1983 for enacting certain state legislation. Here it is unquestioned that absolute immunity attaches. *Tenney* is obviously closer to the latter extreme than to the former. The Court first asked whether investigative hearings were a traditionally legislative function. Then, as a way of determining whether there was a legislative act, it asked whether the specific investigation had exceeded the "bounds of legislative power." The test for such a conclusion was: "it must be obvious that there was a usurpation of function exclusively vested in the Judiciary or Executive."¹⁹ On the merits the Courts had little difficulty in answering these questions in defendant's favor.

Following *Tenney*, courts in 1983 cases readily applied its reasoning to state legislators who voted for certain legislation²⁰ or housekeeping resolutions.²¹ Legislators' participation in committee work²² and on a statutory commission²³ has also been covered by the *Tenney* reasoning. These activities are clearly legislative acts and are properly protected. Furthermore, since *Tenney*, the Supreme Court has elaborated on the attributes of legislative acts under the Speech or Debate Clause upon which *Tenney* so heavily relied.²⁴ It stated that for purposes of congressional immunity, protected matters under that clause "must be an integral part of the deliberative and communicative processes by which members participate in Committee and

18. Clearly these two inquiries are often factually related. An affirmative finding on state action will tend to lead to a similar finding on official capacity. However, this does not mean that the two inquiries are identical. In regard to state action, *see generally* A GUIDE TO SECTION 1983 chapter 2, and J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 451-75 (1978).

19. *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

20. *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1256 (5th Cir. 1976); *Johnson v. Reagan*, 524 F.2d 1123, 1124 (9th Cir. 1975).

21. *Eslinger v. Thomas*, 476 F.2d 225, 228 (4th Cir. 1973).

22. *Gambocz v. Subcommittee on Claims of Joint Legislative Comm.*, 423 F.2d 674, 675 (3d Cir. 1970).

23. *Bergman v. Stein*, 404 F. Supp. 287, 299 (S.D.N.Y. 1975).

24. *See, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975) (holding that the Speech or Debate Clause protected the actions of the Senate Subcommittee on Internal Security in issuing a subpoena for bank records involving respondent in order to determine whether respondent's coffee houses and underground newspapers were potentially harmful to the morale of the U.S. Armed Forces); *Doe v. McMillan*, 412 U.S. 306, 313, 315 (1973) (holding that the Speech or Debate Clause protected the actions of the members and staff

House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.”²⁵ Applying this standard to “legislative acts,” the Court held in one case that Speech or Debate Clause absolute immunity does *not* extend to a Senator’s alleged private arrangement with a private publisher to publish the Pentagon Papers,²⁶ and indicated in a subsequent case that a congressman who arranges for the *public* (as distinguished from internal) distribution of committee materials allegedly infringing upon the rights of individuals is similarly not absolutely immune.²⁷ The Court’s reasoning in these cases is that, despite arguments for a legislative “informing function,” such acts go beyond the reasonable requirements of the legislative function.

Circuit courts have also been sensitive to those situations in which legislators act officially but not legislatively. Several circuits have held that under those circumstances absolute immunity is inappropriate. In a recent New Jersey district court decision,²⁸ the court concluded that absolute immunity did not protect state legislators who were accused of improperly excluding another legislator from a party caucus. While sufficient state involvement was found for state action purposes, the court merely asserted that this was an area in which legislators traditionally did not act.

Davis v. Passman,²⁹ a better reasoned opinion, involved the official immunity of a congressman sued for damages for sex discrimination against a staff employee. The Fifth Circuit curtly rejected the congressman’s defense of absolute immunity. The court first observed that “the constitutional proscription of blatant sex discrimination does not impair [the defendant’s] legitimate control over his staff to any extent at all.”³⁰ Next, after canvassing the Speech or Debate Clause cases, the court concluded that “legislators are not legislating when they dismiss staff members. For the same reasons that the

of the House Special Select Subcommittee in the preparation and distribution of a report on the District of Columbia public school system that documented disciplinary problems of named students. The Court found further that the public dissemination of the report by the Superintendent of Documents and Public Printer was not a legislative act and, therefore, not protected by the Speech or Debate Clause); *Gravel v. United States*, 408 U.S. 606, 625 (1972) (holding that a Senator’s arrangement for private publication of a report prepared by the Department of Defense is not an act within the legislative sphere and, therefore, not protected by the Speech or Debate Clause).

25. *Id.* at 625.

26. *Id.* at 622.

27. *Doe v. McMillan*, 412 U.S. 306 (1973). The arrangement must go beyond merely voting for it. *Id.* at 315.

28. *Ammond v. McGahn*, 390 F. Supp. 655 (D. N.J. 1975), *rev’d on other grounds*, 532 F.2d 325 (3d Cir. 1976).

29. 544 F.2d 865 (5th Cir. 1977), *cert. granted*, 47 U.S.L.W. 3301 (October 30, 1978).

30. *Id.* at 870.

Speech and Debate clause does not extend to staff dismissals, [the defendant] cannot invoke absolute immunity."³¹

The Fifth Circuit's insistence that "the immunized act must be intimately cognate to the legislative process"³² is similarly appropriate in a 1983 context. As observed, the *Tenney* Court reasoned from both the historical purpose of the Speech or Debate Clause and the concern, in the Fifth Circuit's words, "that the prospect of an unsuccessful but burdensome lawsuit might affect a legislator's performance of his or her legislative duties, thus distorting the democratic process."³³ There is thus a class of cases in which a state legislator acting within his official capacity may be denied an absolute immunity because his act is not legislative in nature. Further, such a result may occur even where the state legislator has acted with a reasonable good faith belief that he has absolute immunity. It is true that this is not discussed in *Davis*, *Tenney*, or any of the Speech or Debate Clause cases (perhaps because it was not raised). Still, these cases appear to use an objective test for the "legislative act" inquiry, with no attention paid to the legislator's state of mind.³⁴ However, the state of mind of a legislator denied an absolute immunity is certainly relevant to the application to him of a qualified immunity.³⁵

State Legislative Employees

There has been some confusion in the cases about the proper treatment of section 1983 suits for damages against legislative employees. *Tenney*, standing alone, suggests that such employees are "persons" for 1983 purposes.³⁶ Courts generally have held, however, that legislative employees are pro-

31. *Id.* at 881.

32. *Id.* at 879.

33. *Id.*

34. See notes 103-05 and accompanying text *infra* regarding "judicial acts."

35. An issue which has apparently not as yet arisen is the possibility of a Fourteenth Amendment action for damages against state legislators, judges and prosecutors who have an absolute immunity under both the common law and section 1983. Cf. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (recognizing a federal cause of action for damages caused by federal agents' violation of the Fourth Amendment). However, it is likely that absolute immunity will survive such a Fourteenth Amendment challenge. Cf. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (2d. Cir. 1972).

36. The *Tenney* Court cited *Kilbourn v. Thompson*, 103 U.S. 168 (1881), in which a judgment was entered against the House's Sergeant-at-Arms for an illegal arrest, the court said: "Legislative privilege in such a case [where the defendants are members of a legislature] deserves greater respect than where an official acting on behalf of the legislature is sued . . ." 341 U.S. at 378. This proposition was reiterated in *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

tected only by a qualified immunity.³⁷ Several have gone so far as to hold certain legislative employees absolutely immune from personal liability. The Fifth Circuit, relying on *Tenney*, has said that employee-investigators of a statutorily established investigative commission are absolutely immune from liability for damages.³⁸ An Indiana District Court has held the same for legislative employees.³⁹ These decisions are questionable not only in light of *Tenney's* dictum but also because legislative employees are different from legislators in that they do not require the same autonomy in decision making so necessary for the effective operation of representative government. A qualified immunity appears sufficient for most purposes to ensure that employees are not unduly hampered by litigation and deterred from performing their jobs.⁴⁰

A significant qualification, however, to the suggested general applicability of a qualified immunity to legislative employees must be made. In several Speech or Debate Clause cases, the Supreme Court put a gloss on its language in *Tenney* and extended absolute immunity to Congressional aides, committee staff and committee consultants who investigated and introduced material at committee hearings.⁴¹ In determining whether these acts were legislative acts and thus absolutely immune, the Court was concerned with "freeing the legislator from executive and judicial oversight that *realistically threatens to control his conduct as a legislator.*"⁴² It therefore asked whether the acts would have been protected *had they been done by the legislator himself*. To the extent that these Speech or Debate Clause cases are relevant to the 1983 legislative immunity issue by analogy, the inquiry must focus not only on the defendant's status but also on the nature of the act itself. Viewed in this light, a legislative employee is only absolutely im-

37. See, e.g., *Eslinger v. Thomas*, 476 F.2d 225, 229-30 (4th Cir. 1973). The *Eslinger* defendant, Clerk of the South Carolina Senate, who, in good faith reliance on official custom, refused plaintiff temporary employment as a page in the Senate because she was female, was held immune from liability for damages but not immune from suit for equitable relief.

38. *Martone v. McKeithen*, 413 F.2d 1373, 1376 (5th Cir. 1969) (per curiam).

39. *Porter v. Bainbridge*, 405 F. Supp. 83, 91 (S.D. Ind. 1975). The court neither set forth reasoning for nor offered citations in support of this holding. Also, while the court spoke of immunity, the case actually seemed to involve injunctive relief and federalism concerns. *Id.* at 85, 90-91.

40. See note 4 *supra*. See generally on qualified immunity A GUIDE TO SECTION 1983 chapter 8. A case with an interesting twist is *Saffioti v. Wilson*, 392 F. Supp. 1335, 1343 n.10 (S.D. N.Y. 1975), in which the court in dictum compared a governor, who was sued for injunctive relief after exercising his veto power, with a legislator. This suggests that the governor should be protected by an absolute immunity. This result seems questionable after *Scheuer v. Rhodes*, 416 U.S. 232 (1974), which held that executives are protected only by a qualified immunity, and *Wood v. Strickland*, 420 U.S. 308 (1975), which held the same for school board members regardless of whether they acted in quasi-legislative or quasi-judicial functions. In any event, the court resolved the matter on the merits in favor of the governor. 392 F. Supp. at 1347.

41. *Gravel v. United States*, 408 U.S. 606 (1972); *Doe v. McMillan*, 412 U.S. 306 (1973).

42. *Gravel v. United States*, 408 U.S. at 618 (emphasis added).

mune from liability under 1983 when his act is legislative in nature, such that, had the legislator himself performed it, he would have been immune.⁴³

Local Legislators

The current general rule is that local legislators are not given the *Tenney* absolute immunity. A leading Sixth Circuit case, *Nelson v. Knox*,⁴⁴ involved a suit for damages against city commissioners and others for allegedly intentionally destroying the plaintiff's garage business by enacting and enforcing arbitrary and discriminatory ordinances. Judge (later Justice) Stewart, writing for the court, said first that the scope of the commissioners' immunity under 1983 was a question of federal, not state, law. Then, relying in part on the Supreme Court's decision in *Hague v. Committee for Industrial Organization*,⁴⁵ Judge Stewart held that the commissioners "were not clothed with complete immunity but enjoyed instead a qualified privilege."⁴⁶ Judge Stewart acknowledged that *Hague* involved injunctive relief, not damages, but contended that this made no difference. More to the point, Judge

43. This approach to a legislative employee's immunity is similar to the approach used for determining the scope of immunity of a judicial employee who is following a judge's order or direction. See notes 120-123 and accompanying text *infra*. An additional factor justifying these approaches is the unfairness to a legislative or judicial employee in withholding an absolute immunity while the person responsible for the challenged conduct—the person ordering it—gets its protection.

44. 256 F.2d 312 (6th Cir. 1958).

45. 307 U.S. 496 (1939).

46. 256 F.2d 312, 315 (6th Cir. 1958). Later circuit court cases have applied *Nelson* and a narrow reading of *Tenney* to a variety of fact situations. See, e.g., *Thomas v. Younglove*, 545 F.2d 1171, 1173 (9th Cir. 1976) (applied to county supervisors allegedly discriminating against public employees who were members of a union); *Lane v. Inman*, 509 F.2d 184, 186 (5th Cir. 1975) (applied to the members of an aldermanic police committee accused of illegally revoking a cab driver's city permit); *Curry v. Gillette*, 461 F.2d 1003, 1005 (6th Cir. 1972) (applied to a city's aldermen accused of racial discrimination against plaintiff's ambulance service); *Lynch v. Johnson*, 420 F.2d 818, 821 (6th Cir. 1970) (applied to the members of a county's fiscal court accused of violating procedural due process). The *Lynch* court was not an ordinary judicial tribunal but rather had entirely legislative and administrative powers. Federal district courts have usually done the same. See, e.g., *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977); *Owen v. City of Independence*, 421 F. Supp. 1110 (W.D. Mo. 1976) *aff'd*, 560 F.2d 925 (8th Cir. 1977), *cert. granted*, 98 S. Ct. 3118 (1978). *Smetanka v. Borough of Ambridge*, 378 F. Supp. 1366 (W.D. Pa. 1974).

There are several cases which have taken a contrary view, based either upon reading *Tenney* broadly to protect individuals who legislate at any governmental level or on an interpretation of the common law which confers absolute immunity. See, e.g., *Shannon Fredericksburg Motor Inn, Inc. v. Hicks*, 434 F. Supp. 803 (E.D. Va. 1977); *Teamsters Local Union No. 822 v. City of Portsmouth*, 423 F. Supp. 954, 956 (E.D. Va. 1975). The *Shannon* court, after canvassing the relevant cases and arguments, concluded: "If indeed there is a rational basis for distinguishing the safeguards necessary to permit local legislators to carry out their legislative duties from those which have been clearly accorded the state legislators, same escapes the Court." 434 F. Supp. at 805.

Stewart accepted the view of Judge Magruder in *Cobb v. City of Malden*⁴⁷ who concluded that local legislators should not be absolutely immune under section 1983 because they only have a qualified immunity at common law.

It is not at all clear what the Supreme Court would do if the scope of immunity for local government legislators was presented for review. *Tenney* involved state legislators and the Court compared the historical functions of state legislators and congressmen. Also, according to Judge Magruder in *Cobb*, the common law rule regarding the immunity of local legislators from liability is that it is qualified, not absolute. Further, even if this were not so, later Supreme Court decisions have made it clear that while common law immunity rules for governmental officials may be relevant, they are not dispositive of 1983 immunity.⁴⁸ On the other hand, *Tenney* may be read as functionally emphasizing the need for absolute immunity for legislators, regardless of governmental level.⁴⁹ Additionally, the common law immunity rules may not have been correctly interpreted by Judge Magruder in *Cobb*. It has been stated⁵⁰ that only a "scant majority" of the states accord a qualified immunity for defamation. For other torts the general rule seems to grant absolute immunity for inferior legislative bodies and for state and national legislators.

What the Court *should* do when confronted with this issue depends in part on whether expansion or limitation of absolute legislative immunity under 1983 is considered preferable. On balance, local legislators should not be accorded absolute immunity. Unlike state legislatures, local legislatures are creations of the states and do not possess that independence which is to be furthered by an absolute immunity rule. Thus, the Speech or Debate clause analogy is not applicable to local legislators. Also, because they frequently exercise a mix of legislative and administrative powers, local legislators are more akin to state and local administrative agency members who are entitled only to a qualified immunity.⁵¹ Furthermore, it must be remembered that an expansion of the category of absolutely immune defend-

47. 202 F.2d 701, 707 (1st Cir. 1953) (concurring opinion). This is apparently the current rule in the First Circuit. *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973), applied a qualified immunity to local legislators for legislative acts.

48. E.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

49. *Pierson v. Ray*, 386 U.S. 547 (1967), the Court's post-*Tenney* decision on absolute judicial immunity, may also be relevant because there the judge was a "municipal police justice." The Court in *Pierson* was concerned, however, not with the level of government at which the individual judged, but rather with the judicial function. See text accompanying notes 57-66 *infra*. Cf. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1365 (9th Cir. 1977 *cert. denied*, 99 S. Ct. 91 *REH denied*, 99 S. Ct. 599) (1978), in which the court, in a case of first impression, stated that officers legislating under the authority of an interstate compact have absolute immunity because "such compacts, by their very nature, establish regional legislatures . . . [and we] discern no reason why these 'regional legislators' should not be accorded the same immunity as their state and national counterparts.

50. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 782, 788 (4th ed. 1971).

51. E.g., *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members who "execute," i.e. administer, "legislate," i.e. promulgate regulations, and "judge," i.e. adjudicate, are entitled only to qualified immunity).

ants flies in the face 1983's "person" language. Additional expansion requires weighty justification, justification which is not present for local legislators. Finally, in contrast to the settled common law absolute immunity of state legislators, the common law immunity rules for local legislators are, as noted, somewhat unclear.

It should be noted that legislative immunity, even for state legislators, is limited to damages and does not extend to prohibitory injunctive relief. As the Fourth Circuit recently stated: "we have found [no case] which holds that the immunity doctrine insulates a public official or public employee from injunctive relief to prevent what would otherwise be an illegal act on his part."⁵² This is also the clear implication of a Supreme Court decision⁵³ which permitted injunctive relief under 1983 against certain members of the Georgia State Legislature. Furthermore, limiting legislative immunity in this way follows from the emphasis in *Tenney* and the decisions in the circuits on avoiding the chilling effect of potential 1983 *damages* litigation upon legislative independence. At least one circuit court has been reluctant, however, to issue a mandatory injunction with the apparent effect of forcing legislators to vote in a certain way.⁵⁴ The court said: "Quite simply, it would have been a violation of the separation of powers with the court acting as a legislature."⁵⁵ A comparable reluctance to issue mandatory injunctions interfering with judicial discretion appears in several judicial immunity cases.⁵⁶

JUDICIAL IMMUNITY FROM LIABILITY FOR DAMAGES:

PIERSON V. RAY

*Pierson v. Ray*⁵⁷ established absolute judicial immunity from liability for damages under section 1983. In *Pierson*, the plaintiffs had been arrested by the defendant police officers, convicted and given the maximum sentence by the defendant municipal police justice for violating a Mississippi breach of the peace statute.⁵⁸ After plaintiffs had been vindicated in a trial *de novo*, they sued the defendants for damages under 1983 as well as for false arrest and imprisonment at common law.

In holding that the municipal police justice was absolutely immune from liability for damages under 1983,⁵⁹ the Court compared judicial immunity at common law with legislative immunity. Following *Tenney's* approach, the Court stated that the legislative history of section 1983 did not indicate an

52. *Rowley v. McMillan*, 502 F.2d 1326, 1332 (4th Cir. 1974).

53. *Bond v. Floyd*, 385 U.S. 116 (1966).

54. *Mahaley v. Cuyahoga Metropolitan Hous. Auth.*, 500 F.2d 1087 (6th Cir. 1974).

55. *Id.* at 1092.

56. See notes 138-149 and accompanying text *infra*.

57. 386 U.S. 547 (1967).

58. This statute was held unconstitutional by the Supreme Court as applied to similar facts several years later. *Thomas v. Mississippi*, 380 U.S. 524 (1965).

59. 386 U.S. 547, 553 (1967).

intention to abolish the common law immunity of judges.⁶⁰ The Court also observed that the only role the police justice played was to find plaintiffs guilty. It then went on to hold that judges should be absolutely immune from liability for damages for acts within their judicial jurisdiction in order to preserve the autonomy of judicial decision-making.⁶¹

An interpretation of section 1983 as excluding judges⁶² is more questionable than *Pierson's* interpretation excluding state legislators. As Justice Douglas, dissenting in *Pierson*, pointed out, the legislative history of section 1983 and its criminal law counterpart, now 18 U.S.C. § 242, indicates that it is to apply to judges and that, indeed, "[i]t was recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied."⁶³ It has also been suggested that, in contrast with the history of legislative immunity set out in *Tenney*,⁶⁴ judicial immunity at common law was not so well established as the Court thought in *Pierson*.

Nevertheless, the result in *Pierson* was probably inevitable given *Tenney's* approach to reading section 1983 against a background of common law immunity. It is worth noting in this connection that with few exceptions,⁶⁵

60. The Court noted:

The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities The immunity of judges for acts within the judicial role is [as] equally well established [as absolute legislative immunity], and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

Id. at 554.

61. The Court reasoned that judges are absolutely immune from liability for damages for acts committed within their judicial jurisdiction . . . even when the judge is accused of acting maliciously and corruptly It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. *Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.*

Id. (emphasis added).

62. There is no serious question as to Congress' power to impose criminal sanctions upon state judges for constitutional violations. *Ex parte Virginia*, 100 U.S. 339 (1879). The same is true for civil liability. In *Pierson*, of course, the question was one of congressional intent, not power.

63. 386 U.S. at 563. He argues in effect for a qualified immunity for judges. *See also* Kates, *Immunity of State Judges Under the Federal Civil Rights Act: Pierson v. Ray Reconsidered*, 65 NW. U. L. REV. 615 (1970).

64. 341 U.S. 367, 372-375. *See* Comment, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969), in which the author states that "judicial immunity was not a universal doctrine." *Id.* at 325. Under common law, although superior judges were "absolutely immune . . . justices of the peace . . . were liable to civil suit if they acted maliciously." *Id.* *See also* Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

65. One early exception was *Picking v. Pennsylvania R.R. Co.*, 151 F.2d 240 (3d Cir. 1945), *overruled* *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966), *cert denied*, 386 U.S. 1021 (1967).

federal courts, especially after *Tenney*, and even before *Pierson*, began to apply the doctrine of absolute judicial immunity consistently.⁶⁶ Consequently, after *Pierson*, the question is no longer the existence of absolute judicial immunity, but rather its scope. *Pierson* indicates that the immunity only applies to acts within "judicial jurisdiction." This, however, does little to define the scope of judicial immunity. *Pierson*, a relatively easy case which involved a judge who clearly acted in a traditional judicial capacity, held, not surprisingly, that a judge acts within his judicial jurisdiction even if he applies a statute unconstitutionally.

*"Judicial Jurisdiction," Bradley v. Fisher and Stump v. Sparkman:
The Scope of Judicial Immunity from Liability for Damages*

While it was relatively easy in *Pierson* to find that the police justice acted within his "judicial jurisdiction," *Pierson* did not determine the scope of judicial jurisdiction. This term was coined in *Bradley v. Fisher*,⁶⁷ an 1871 Supreme Court decision cited with approval in *Pierson*, in which a criminal court judge for the District of Columbia was sued for damages by a lawyer whom he removed from practice before his court without notice and the opportunity to defend. The Court elaborately set out the general rules which define judicial jurisdiction:

[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.⁶⁸

66. So noted in *Pierson*. 386 U.S. at 555 n.9.

67. 80 U.S. 335 (1871). *Bradley* is, of course, not a 1983 case.

68. *Id.* at 351-352 (emphasis added). The Court continued, illustrating the dichotomy between acts in excess of jurisdiction and acts performed in the absence of all jurisdiction:

Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party

In applying these principles to the facts before it, the Supreme Court in *Bradley* observed that while the defendant judge had the power to remove a lawyer from the bar, this should not ordinarily be done without notice and the opportunity to explain and defend. Nevertheless, even though the defendant judge erred in not giving plaintiff such notice, this constituted at most an excess of jurisdiction but "did not make the act any less a judicial act; . . . [it was not] as though the court had proceeded without any jurisdiction whatever over its attorneys."⁶⁹ Thus, the defendant judge was absolutely immune from liability for damages for the allegedly wrongful disbarment.

Several matters are noteworthy. First and foremost is the distinction the Court draws between "excess of jurisdiction" and the "clear absence of all jurisdiction" over the subject matter. Second, the Court mentions subject matter jurisdiction several times, but mentions jurisdiction over the person only once. In *Bradley*, it appears that while the defendant judge may not have given the plaintiff notice of the disbarment, the judge retained personal jurisdiction over the plaintiff although the jury in the case in which plaintiff and defendant were involved had already been discharged.⁷⁰ However, the relevance of personal jurisdiction is nowhere made clear.

Moreover, the two examples set forth by the Court⁷¹ are intriguing. The first concerns a probate judge who tries criminal offenses; he acts, according to *Bradley*, in clear absence of all jurisdiction. In its discussions, the Court may have intimated that the probate judge's state of mind is relevant to a finding of clear absence of all jurisdiction because it spoke at one point of this clear absence as "necessarily known" to the probate judge, and at another juncture similarly qualified its clear absence rule by adding "when the want of jurisdiction is known to the judge."⁷² The Court may have set out a test for judicial immunity that includes both objective and subjective elements: the judge must know of a clear absence of subject matter jurisdiction which exists in fact before he loses his immunity.

charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for *these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked*. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is *jurisdiction of both subject and person*, applies in cases of this kind, and for the same reasons.

Id. at 352 (emphasis added).

69. *Id.* at 357.

70. *Id.* at 356-57.

71. *Id.* at 352.

72. *Id.*

The Court's second example concerns a judge with general criminal jurisdiction who either convicts a person of an act which is not in fact criminal or gives a person an unauthorized sentence.⁷³ This judge, according to the Court, has acted only in excess of jurisdiction and does not lose his judicial immunity. The puzzling aspect is why the Court characterizes this as jurisdictional, when it appears to be an error of law going to the merits. Further, suppose it is somehow jurisdictional. If the judge knows in fact that the act is not a crime or that the sentence is unauthorized, does he then act in clear absence of jurisdiction?

Pierson retained the jurisdictional language of *Bradley* in holding that the police justice acted within his "judicial jurisdiction." Indeed, as mentioned, applying the *Bradley* approach in *Pierson* is rather straightforward and poses no serious problems, because the police justice clearly had both subject matter jurisdiction and personal jurisdiction. In *Bradley's* terms, he acted, at most, only in excess of his jurisdiction when he convicted the plaintiffs under an unconstitutionally applied statute. Also, because the *Pierson* court did not even inquire whether he knowingly did so, this suggests a judge's state of mind is irrelevant when he makes a legal error. He would not lose his absolute immunity regardless of his alleged state of mind; he would still have acted only in excess of jurisdiction in *Bradley's* terms.⁷⁴ Such a result seems consistent with the emphasis in both *Bradley* and *Pierson* on preventing litigants from challenging a judge's motivation and on encouraging resort instead to the appellate process to correct legal errors.

In considering the implications of *Bradley* and *Pierson*, those relatively few cases in which courts have held that judges lose their absolute immunity are helpful in evaluating the proper scope of judicial immunity.⁷⁵ A Sixth

73. *Id.*

74. The Mississippi statute involved in *Pierson* was, it is true, held unconstitutional as applied to similar facts only *after* the police justice convicted the plaintiffs. See note 58 *supra*. However, the Supreme Court, in *Boynton v. Virginia*, 364 U.S. 454 (1960), had *previously* held a similar statute unconstitutional as applied to virtually identical facts. *Boynton* was apparently brought to the timely attention of the police justice. See Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615, 617 (1970).

75. Also illustrative of the proper scope of judicial immunity are those circuit court cases which, following the *Bradley-Pierson* jurisdictional approach, have held absolute judicial immunity applicable to section 1983 allegations. See, e.g., *Humble v. Foreman*, 563 F.2d 780, 781 (5th Cir. 1977) (per curiam) (judge conspired with prosecutor and defense counsel during plea bargaining to deny plaintiff effective assistance of counsel); *Conner v. Pickett*, 552 F.2d 585, 586 (5th Cir. 1977) (per curiam) (judge violated plaintiff's civil rights by convicting him for possession of narcotics paraphernalia); *Dean v. Shirer*, 547 F.2d 227, 230 (4th Cir. 1976) (judge, following a trial and the plaintiff's disparaging comments about him to a crowd outside the courtroom, had plaintiff, an attorney, brought back into the courtroom, threatened him with bodily harm and jail, and forced him to retract his earlier comments; judge still retained subject matter jurisdiction over the case and his acts were judicial acts because they were part of his exercise of the contempt power); *Keeton v. Guedry*, 544 F.2d 199, 200 (5th Cir. 1976) (per curiam) (judge issued a warrant for the arrest of plaintiff for stopping payment on a check after discovering defects in a purchased truck, an act which was not a criminal offense; court emphasized that judge "clearly believed that criminal conduct possibly had occurred."); *Harley v.*

Circuit decision, *Lucarell v. McNair*, held that a plaintiff who alleged that a juvenile court referee illegally incarcerated him in connection with traffic court proceedings stated a cause of action. The referee acted in "absence of all jurisdiction" because, according to the complaint, he lacked power to incarcerate under state law.⁷⁶ A similar and much cited Ohio district court case, *Wade v. Bethesda Hospital*,⁷⁷ involved a 1983 claim against a probate judge who allegedly conspired with others to sterilize the plaintiff.⁷⁸ In considering whether the defendant "acted outside the scope of his jurisdiction," the court set out the following three pronged test:

Oliver, 539 F.2d 1143, 1145 (8th Cir. 1976) (probate judge, who had statutory jurisdiction over guardianships, caused emotional distress when he improperly denied plaintiff custody of her minor son); Grundstrom v. Darnell, 531 F.2d 272, 273 (5th Cir. 1976) (per curiam) (justice of the peace, who has subject matter jurisdiction and is to be treated like any other judge, improperly denied bail to plaintiff); Wiggins v. Hess, 531 F.2d 920, 921 (8th Cir. 1976) (per curiam) (judge from one county who specially presided over plaintiff's criminal trial in another county improperly issued an order for his arrest and commitment under the seal of the first county and also improperly imprisoned him for a crime which carried no prison sentence); Waits v. McGowan, 516 F.2d 203, 205 (3d Cir. 1975) (judge improperly withheld information regarding plaintiff's illegal extradition from Canada, thereby resulting in plaintiff's imprisonment); Duba v. McIntyre, 501 F.2d 590, 591 (8th Cir. 1974) (justice of the peace ordered the attachment and sale of plaintiff's entire stock of hogs on the pretext of satisfying a \$55 misdemeanor fine; conceding that justice of the peace acted in excess of jurisdiction, the court held that his acts were within the general power of judges to issue executions to recover fines imposed for violations of municipal ordinances); Barnes v. Dorsey, 480 F.2d 1057, 1060 (8th Cir. 1973) (judge who presided at a burglary trial conspired with others in order to suppress certain exonerating information in a police report); Mississippi *ex rel* Giles v. Thomas, 464 F.2d 156, 158-59 (5th Cir. 1972) (justice of the peace wrongfully entered a default order evicting plaintiff because the summons contained an erroneous return date); Robinson v. McCorkle, 462 F.2d 111, 113 (3d Cir. 1972) (judge ordered the plaintiff committed under a repealed statute "such judicial miscue does not remove the shield of immunity."); Jacobson v. Schaefer, 441 F.2d 127, 130 (7th Cir. 1971) (judge improperly attached certain conditions to plaintiff's bail; although judge did not in fact have authority to do what he did—court emphasized that he had general jurisdiction over the subject matter); Berg v. Cwiklinski, 416 F.2d 929, 931 (7th Cir. 1969) (judge improperly imprisoned a traffic court defendant for contempt for refusing to answer a prosecutor's questions on the ground of self-incrimination).

76. 453 F.2d 836 (6th Cir. 1972).

77. The court emphasized that it relied solely on the complaint and thus it did not have to reach the issue of the scope of the defendant's contempt power. The court also did not discuss the assault contention in connection with immunity. *But see* Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), *cited with apparent approval* Stump v. Sparkman, 435 U.S. 349, 361 n.10 (1978), in which the court characterized such an act as not of a judicial nature and denied absolute immunity to the defendant. The court said:

The decision to personally evict someone from a court room by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached [W]hen a judge exercises physical force in a courtroom, his decision is not amenable to appellate correction.

500 F.2d at 64.

78. 337 F. Supp. 671 (S.D. Ohio 1971), *reconsideration of motion to dismiss denied*, 356 F. Supp. 380 (S.D. Ohio 1973).

The cases are clear that the term jurisdiction means that the judge must have both [1] jurisdiction over the person and [2] subject matter if he is to be immune from suit for an act performed in his judicial capacity . . . [3] A third element . . . [which] enters into the concept of jurisdiction . . . is the power of the Court to render the particular decision which was given . . . [that is] whether the defendant's action is authorized by any set of conditions or circumstances.⁷⁹

After finding that no Ohio statute authorized a judge to order sterilization for any purpose and no judicial precedent for such an order existed absent a specific statute, the court concluded: "Because there was no set of circumstances or conditions under Ohio law which would permit defendant Gary to order plaintiff to submit to sterilization, the Court determines that defendant Gary acted wholly without jurisdiction in this matter. Consequently, defendant Gary is not protected by the doctrine of judicial immunity."⁸⁰

These decisions seem to go beyond the *Bradley-Pierson* approach in treating the defendant judges as acting in clear absence of jurisdiction. First, they apparently considered their fact situations to be substantially similar to *Bradley's* example of a probate judge who tries criminal cases but substantially different from the other *Bradley* example of a criminal court judge who either convicts a person of an act which is not a crime or imposes an unauthorized sentence upon a person. Why this is so is unclear since in *Lucarell* the incarceration might be termed an unauthorized sentence and in *Wade* the sterilization might be termed an illegal order. Unlike the *Bradley* probate judge example, these judges had the power to do something with the plaintiffs in connection with the reasons the plaintiffs were before them at the outset.⁸¹

Thus, *Lucarell* and *Wade* appear in fact to be cases where the judges acted in "excess of jurisdiction" and not in "clear absence" of it. The errors made by these judges as to their powers in the particular cases before them should not be treated as acts in clear absence of jurisdiction. As *Bradley* itself recognized, "some of the most difficult and embarrassing questions" for a judge involve his jurisdiction and powers.⁸² This was also acknowledged in a Second Circuit decision predating *Lucarell* and *Wade* which involved a claim based upon plaintiff's conviction for assault by a justice of the peace who did not have subject matter jurisdiction over this offense.⁸³ In holding that absolute immunity attached, the court stated that absolute immunity is

79. *Id.* at 673.

80. *Id.* at 674.

81. In *Lucarell*, the defendant could have fined the plaintiff; in *Wade*, there was a statute giving the defendant general subject matter jurisdiction over mentally retarded persons.

82. *Bradley v. Fisher*, 80 U.S. 335, 352 (1851).

83. *Fanale v. Sheehy*, 385 F.2d 866 (2nd Cir. 1967).

lost only in those exceptional circumstances when it is perfectly clear that a judge acts in the absence of jurisdiction.⁸⁴

That a judge with general subject matter jurisdiction loses his absolute immunity if he errs grossly and issues an unauthorized order—the proposition for which *Lucarell* and *Wade* stand—was thus questionable even before the Supreme Court's 1978 decision in *Stump v. Sparkman*.⁸⁵ After *Stump*, which reversed a Seventh Circuit decision holding that a judge had lost his absolute immunity, it is clearly untenable. *Stump* concerned the issue, similar to that in *Wade*, of the judicial immunity of a judge who ordered the sterilization of a fifteen year old girl upon her mother's petition.⁸⁶ The facts in *Stump* apparently shocked the Seventh Circuit which noted that the order was issued in an ex parte proceeding. Further, no guardian ad litem was appointed to represent the child's interests and no hearing was held. She never received notice of the petition and neither the petition nor the order was ever filed in the circuit court.⁸⁷

Applying the *Bradley-Pierson* test, the Seventh Circuit reversed the district court and found that the defendant had acted in clear absence of subject matter jurisdiction, even though the Circuit Court of DeKalb County was by statute a court having original and exclusive jurisdiction in all cases at law and in equity.⁸⁸ In order for the judge's act to come within the statute, the court said, it must have either a statutory or common law basis.⁸⁹ After examining Indiana law, the court found no such basis. Further, it rejected the defendant's argument that he was exercising his power to fashion new common law.⁹⁰ First, judges "may not use the power to create new decisional law to order extreme and irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate . . . [Otherwise] we would be sanctioning tyranny from the bench."⁹¹ Alternatively, the court stated that the defendant's exercise of his common law power was illegitimate "because of his failure to comply with elementary principles of procedural due process."⁹²

The Supreme Court reversed. As it had in *Pierson*, the Court cited *Bradley* for its approach distinguishing between excess of jurisdiction and the

84. The court stated explicitly that "[w]here jurisdiction depends on the resolution of factual issues or involves debatable questions of law, judges do not lose their immunity . . . [E]xceptions must be confined to situations in which it is perfectly clear that the court acted wholly without jurisdiction." *Id.* at 868.

85. *Stump v. Sparkman*, 435 U.S. 349 (1978), reversing *Sparkman v. McFarlin*, 552 F.2d 172 (7th Cir. 1977).

86. Plaintiff was not told the true reason for her hospitalization. Instead, a pretext was used. 435 U.S. at 353.

87. 552 F.2d at 173.

88. *Id.*

89. *Id.* at 174.

90. *Id.* at 175-76.

91. *Id.* at 176.

92. *Id.*

clear absence of all jurisdiction. It then noted the difficult nature of jurisdictional questions and concluded: "We cannot agree that there was a 'clear absence of all jurisdiction' in the DeKalb County Circuit Court to consider the petition presented. . . ." ⁹³ In reaching this conclusion, the Court mentioned the broad jurisdictional grant and, turning the Seventh Circuit's argument around, observed that "there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump." ⁹⁴ The Court, citing *Bradley* again, also rejected the Seventh Circuit's due process argument as "misconceiv[ing] the doctrine of judicial immunity. A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." ⁹⁵ In short, the Court broadly construed the scope of the judge's jurisdiction because "the issue is the immunity of the judge."

The Court then considered and rejected the argument that the judge was nevertheless not entitled to immunity because his approval of the petition was not a "judicial act" as a result of the informality of the judge's approval of the petition. ⁹⁶ Noting that this was the first time such an issue was ever before it in connection with immunity, the Court agreed that judicial immunity would only attach to a judicial act. Relying on one of its decisions in a different context ⁹⁷ and on several circuit court decisions, ⁹⁸ the Court stated:

[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function usually performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity. ⁹⁹

93. *Stump v. Sparkman*, 435 U.S. 349, 357.

94. *Id.* at 358.

95. *Id.* at 359.

96. The Court noted that "the petition was not given a docket number, was not placed on file with the clerk's office, and was approved in an *ex parte* proceeding without notice to the minor, without a hearing, and without the appointment of a guardian *ad litem*." *Id.* at 360.

97. *In re Summers*, 325 U.S. 561 (1945), in which the Court held that the lack of formality involved in a state court's consideration of an application for admission to the bar did not prevent it from constituting a case or controversy reviewable by the Court.

98. *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) (judge's physical assault upon plaintiff was held not to be a judicial act); *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972) (judge was entitled to judicial immunity even though he had plaintiffs arrested, in the apparent exercise of his contempt power, when he was not in his robes, not in the courtroom, and in apparent violation of procedural requirements for contempt citations); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970) (judge serving on a board with only legislative and administrative powers was not acting in a judicial capacity).

99. *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

The Court applied these factors to the facts before it and concluded that despite the informality of the proceedings and their *ex parte* nature, the approval of the petition was a judicial act and hence protected.

Justices Stewart, Marshall and Powell vigorously dissented, arguing that what the judge did "was beyond the pale of anything that could sensibly be called a judicial act."¹⁰⁰ They criticized the majority's factors and instead contended that the meaning of a "judicial act" derives from those considerations set out in *Pierson* which support absolute immunity in the first place.¹⁰¹ Justice Powell added what he considered to be central: the defendant's "preclusion of any possibility for the vindication of [plaintiff's] rights elsewhere in the judicial system."¹⁰² He emphasized that the major reason for absolute immunity is the existence of "alternative forums and methods for vindicating [private] rights," and that absent such forums, "the underlying assumption of the *Bradley* doctrine is inoperative."¹⁰³

Stump indicates clearly that the *Lucarell* and *Wade* cases were incorrectly decided. In both cases there was general subject matter jurisdiction and the defendant's acts were judicial in nature under the *Stump* majority's reasoning. However, in continuing to use the "jurisdiction" approach of *Bradley* and *Pierson*, the Court did little to clarify the factors which distinguish between "excess of jurisdiction" and "clear absence of all jurisdiction" and the confusing relation between those factors and the merits. In any event, since the Court addressed the judicial act question in *Stump*, the inquiry into judicial immunity is now roughly parallel to the inquiry into legislative immunity. After ascertaining that the defendant's status is that of a legislator or a judge, an inquiry must be then made into whether the defendant legislator's act was performed in a traditional legislative field or the defendant judge's act was within his jurisdiction. If so, the next question requires characterization of the act performed in order to decide whether it was a legislative act or a judicial act. Thus, despite the "jurisdiction" jargon of the judicial immunity cases, in reality the same general kinds of questions are being asked for both legislative and judicial immunity.

However, what is especially disturbing about *Stump* is the Court's failure¹⁰⁴ to answer Justice Powell's point about the unavailability of an alter-

100. *Id.* at 365.

101. The dissenters stated:

[T]here was no "case," controversial or otherwise. There were no litigants. There was and could be no appeal. And there was not even the pretext of a principled decisionmaking. [There was a] total absence of *any* of these normal attributes of a judicial proceeding . . . [thus] the conduct complained of . . . was not a judicial act.

Id. at 368-69.

102. *Id.* at 369.

103. *Id.* at 370.

104. The Court mentions the issuance of search warrants as an example of an *ex parte* proceeding without recourse to appeal. *Id.* at 363 n.12. However, while the issuance cannot be undone by appeal, its adverse effect, if any, *can* be by a motion to suppress. This sharply distinguishes search warrants from the *ex parte* approval of the sterilization petition in *Stump*.

native forum to plaintiff because of the judge's conduct. Where there is a physical assault by a judge upon a person, an act which the Court agreed is not a judicial act, there is no alternative forum available to the injured person to stop the judge; the damage has already been done. Thus, it makes sense to hold that judicial immunity is not applicable. In *Stump*, the sterilization of plaintiff was the equivalent of a physical assault as to which there was also no recourse. In both cases the only remedy was retrospective. For this reason, both acts were similarly not functions "normally performed by a judge," contrary to the majority's characterization of the judge's approval of the petition.

In this light, *Stump's* message is clear: it will be a rare case indeed in which a judge will lose his absolute immunity. The Court may be saying about judges what it said long ago about the immunity under federal law of the Postmaster General:

As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and *action having more or less connection with the general matters committed by law to his control or supervision*.¹⁰⁵

Persons Protected by Judicial Immunity

Judges at all levels who act in a judicial capacity¹⁰⁶ are protected by absolute immunity. This includes justices of the peace,¹⁰⁷ municipal referees,¹⁰⁸ and presumably judges at both the trial and appellate level.¹⁰⁹ Occasionally it becomes necessary to decide whether what is formally called a court in fact exercises a judicial function; if it does not, but is, for example, "entirely legislative and administrative," then its members are not considered judges—even if they are so called—and thus are not protected by absolute immunity.¹¹⁰ Some courts have applied absolute immunity to members of quasi-judicial agencies, comparing them functionally with judges even though they are clearly not judges. This questionable tendency is especially marked in connection with parole boards and with courts emphasizing their quasi-judicial functions as well as their relation "to the operation of a state judicial and penal system."¹¹¹

105. *Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (emphasis added).

106. See generally notes 67-105 and accompanying text *infra*.

107. *Pennebaker v. Chamber*, 437 F.2d 66 (3rd Cir. 1971).

108. *Lucarell v. McNair*, 453 F.2d 836 (6th Cir. 1972).

109. *Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966).

110. *Lynch v. Johnson* 420 F.2d 818 (6th Cir. 1970) (finding a fiscal court to be nonjudicial in nature).

111. *Silver v. Dickson*, 403 F.2d 642, 644 (9th Cir. 1968). See also, *Johnson v. Wells*, 566 F.2d 1016 (5th Cir. 1978); *Pate v. Alabama Bd. of Pardons and Paroles*, 409 F. Supp. 478 (M.D. Ala. 1976).

There is language in some of the cases suggesting that acts of persons "in the performance of an integral part of the judicial process" are protected by absolute judicial immunity.¹¹² This reasoning has been applied to clerks of court,¹¹³ sheriffs,¹¹⁴ probation officers,¹¹⁵ court reporters,¹¹⁶ and court-appointed medical examiners.¹¹⁷ However, as the Fourth Circuit has pointed out in *McCray v. Maryland*,¹¹⁸ this reasoning is flawed because the functions of absolute immunity for judges are not applicable to these other officials who do not make judicial decisions. It makes considerably more sense to hold that clerks and others are protected only by a qualified immunity.¹¹⁹ They should, however, be protected by an absolute judicial immunity when they act pursuant to court order or direction.¹²⁰ This exception to the qualified immunity rule, acknowledged by the Fourth Circuit in *McCray* and suggested by the Supreme Court in *O'Connor v. Donaldson*¹²¹ is fair and prevents disruption of the judicial process.¹²² Furthermore, it explains the result in many of the cases purporting to apply an absolute immunity rule.¹²³

This approach is questionable in view of *Wood v. Strickland*, 420 U.S. 308 (1974), in which the Supreme Court applied only a qualified immunity to school board members though they acted in a quasi-judicial capacity.

112. *Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970).

113. *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973); *Smith v. Rosenbaum*, 460 F.2d 1019 (3d Cir. 1972); *Mercedes v. Barrett*, 453 F.2d 391 (3rd Cir. 1971); *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970).

114. *People ex rel. Giles v. Thomas*, 464 F.2d 156 (5th Cir. 1972).

115. *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970).

116. *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969).

117. *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970).

118. 456 F.2d 1 (4th Cir. 1972).

119. The Eighth Circuit followed *McCray* in *Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973).

120. In *Lockhart v. Hoenstine*, 411 F.2d 455, 460 (3rd Cir. 1969), the court emphasized both the "manifest unfairness of subjecting one to suit as a consequence of action taken at the direction of officials over whom the individual actor has no power or control," and the likelihood of dismissal if the defendant refuses to comply. See also *Smith v. Martin*, 542 F.2d 688 (6th Cir. 1976); *Robinson v. McCorkle*, 462 F.2d 111 (3rd Cir. 1972); *Sullivan v. Kelleher*, 405 F.2d 486 (1st Cir. 1968).

121. 422 U.S. 563, 577 (1975). The Court applied a qualified immunity to a state psychiatrist after it observed that he did not contend he acted pursuant to court order in keeping the plaintiff confined.

122. Note, *The Doctrine of Official Immunity Under the Civil Rights Acts*, 68 HARV. L. REV. 1229, 1239 (1955). See also *Hazo v. Geltz*, 537 F.2d 747 (3rd Cir. 1976), where a deputy sheriff was sued under 1983 for allegedly causing an invalid levy against plaintiff's personal property pursuant to a default judgment. In remanding, the court held that only a qualified immunity would apply unless evidence of "direct judicial supervision," not simply administrative convenience, was shown. *Id.* at 751.

123. See, e.g., *Smith v. Rosenbaum*, 460 F.2d 1019 (3d Cir. 1972); *People ex rel. Giles v. Thomas*, 464 F.2d 156 (5th Cir. 1972).

Injunctive Relief: An Exception to Judicial Immunity

It has been accepted in the circuits, and implied by the Supreme Court,¹²⁴ that judicial immunity is limited to damages and does not extend to injunctive relief. *Littleton v. Berbling*,¹²⁵ a leading case from the Seventh Circuit, so held where class discrimination based on race was alleged in connection with the application of the criminal laws. It relied primarily on two decisions, also involving class discrimination based on race, which found that judicial immunity extended only to immunity from damages.¹²⁶ However, the injunctive relief exception is apparently not limited to class discrimination cases. The Second Circuit, in a case which involved plaintiff's attempt to enjoin disciplinary proceedings instituted against him by the judges of the Appellate Division of New York, has stated: "[N]o sound reason exists for holding that federal courts should not have the power to issue injunctive relief against the commission of acts in violation of a plaintiff's civil rights by state judges acting in their official capacity."¹²⁷ The Fourth Circuit has more recently taken a similar position.¹²⁸

Despite this general acceptance of an injunctive relief exception,¹²⁹ concern has been expressed about interfering with the exercise of state judicial discretion. As stated by Judge Dillion, dissenting in *Littleton*:

[I]n the cases . . . in which this [exception] has been applied, the equitable relief granted has invariably been in the form of a prohibitory injunction, confining such officials to the limits of their legal authority. There is a great difference between ordering an official not to do a particular act, measurable by objective standards, and in ordering him to exercise his discretion in a certain general way, measurable only by subjective standards.¹³⁰

124. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974). The Court implied that if there is a showing of irreparable injury which is both great and immediate there is the possibility that injunctive relief will issue. It is clear that the Supreme Court is reluctant to permit federal equitable intervention in proceedings involving state officials. See generally A GUIDE TO SECTION 1983 chapter 5.

125. 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub. nom.* *O'Shea v. Littleton*, 414 U.S. 488 (1974).

126. *United States v. Clark*, 249 F. Supp. 720, 722 (S.D. Ala. 1965) (three judge court) and *United States v. McLeod*, 385 F.2d 734, 738 n.3 (5th Cir. 1967).

127. *Erdmann v. Stevens*, 458 F.2d 1205, 1208 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972). See also *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (three judge court), *aff'd*, 401 U.S. 154 (1971).

128. *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975). See also *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973) which relied on *Littleton*. *Id.* at 696. *Fowler* did not involve class discrimination.

129. See *Shipp v. Todd*, 568 F.2d 133 (9th Cir. 1978), in which the court held that while a court clerk acting pursuant to judicial direction was absolutely immune from liability for damages, he was not immune from injunctive relief ordering him to expunge the plaintiff's state criminal conviction.

130. *Littleton v. Berbling*, 468 F.2d 389, 415 (7th Cir. 1972), *rev'd sub. nom.* *O'Shea v. Littleton*, 414 U.S. 488 (1974).

The Fifth Circuit has expressed a similar note of caution in a case where the plaintiff in effect was asking the federal court to hold the decision of a state appellate court to be unconstitutional. While it ended up relying on collateral estoppel, the court did observe that the plaintiff's "requested relief would directly and irrebutably interfere with a discretionary judicial function."¹³¹ However, the concern reflected in such cases is not with the threat to judicial independence stemming from unhappy litigants, as it is in cases involving actions for damages. The concern is rather with the sensitive relationship between state and federal courts when the latter attempt to regulate state judicial conduct. Indeed, the Supreme Court raised this federalism and comity concern in connection with injunctive relief directed against judges and prosecutors who were allegedly enforcing the criminal laws in a racially discriminatory way.¹³²

The injunctive relief exception to judicial immunity seems to be the equivalent of a bifurcated approach to the meaning of "person" under section 1983; that is, a judge, because he is absolutely immune, is treated as if he were *not* a "person" for damages purposes, but is treated as a "person" for injunctive relief purposes. Despite the difficulty in another context with such a bifurcated approach,¹³³ there is no such difficulty here. The Court would use the *Ex parte Young*¹³⁴ fiction and consider the judge being sued for injunctive relief as an individual stripped of his official functions and thus as a "person" for 1983 purposes. Furthermore, applying judicial immunity to a judge does not mean that he is not a "person," but only that he is a "person" who is absolutely immune from liability for damages and not from injunctive relief.

131. *Cheramie v. Tucker*, 493 F.2d 586, 588 (5th Cir. 1974), *cert. denied*, 419 U.S. 868 (1974).

132. *O'Shea v. Littleton*, 414 U.S. 488, 499-502 (1974). This was the second ground used in reversing the Seventh Circuit. See note 125 and accompanying text *supra*. The first ground was the absence of a case or controversy.

Federalism and comity concepts are beyond the scope of this Article. These concepts are however, of considerable significance in cases involving attempts by 1983 plaintiffs to secure declaratory or injunctive relief in connection with the constitutionality of state statutes involved in pending state criminal proceedings. See *Younger v. Harris*, 401 U.S. 37 (1971) and its numerous progeny. So-called "*Younger* abstention" is discussed briefly in C. WRIGHT, *LAW OF FEDERAL COURTS* 229-36 (3d ed. 1976). See generally A GUIDE TO SECTION 1983 chapter 5.

133. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), which rejected a similar approach for municipalities, appears to undercut the rationale of the foregoing cases. In holding that municipalities are not "persons" for section 1983 purposes regardless of the relief sought, the Court stated that a bifurcated approach to the meaning of "person" was without support. *Id.* at 513. However, this has all been changed since *Monell v. Department of Soc. Serv.*, 98 S. Ct. 2018, 2041 (1978), which held that cities and counties are "persons" for 1983 damages purposes. See n.2 *supra*. Such "persons" can also now be sued for injunctive relief.

134. 209 U.S. 123 (1908).

PROSECUTORIAL IMMUNITY FROM LIABILITY FOR DAMAGES:

IMBLER v. PACHTMAN

The Supreme Court's recent decision in *Imbler v. Pachtman*¹³⁵ granting prosecutorial immunity from liability for damages under section 1983 relied on *Tenney v. Brandhove*,¹³⁶ *Pierson v. Ray*¹³⁷ and later cases involving the immunity of various governmental officials.¹³⁸ In *Imbler*, the plaintiff sued a state prosecutor for allegedly knowingly using perjured testimony and suppressing material evidence at plaintiff's trial which resulted in his conviction for murder. The matter at issue was "whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U.S.C. § 1983 for alleged deprivations of the defendant's constitutional rights."¹³⁹ The Court held the prosecutor absolutely immune.

The Court first canvassed its earlier decisions on immunities under 1983, saying that *Tenney* "established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."¹⁴⁰ It then generalized by observing that "each [earlier decision on 1983 immunities] was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."¹⁴¹ Using this approach, the Court next asserted that at common law prosecutors were absolutely immune from tort liability with respect to their decisions to initiate and conduct prosecutions¹⁴² for at least two reasons: (1) harassment by unfounded litigation which would divert attention from their duties; and (2) the effect of litigation on their independence in making decisions. Finally, in concluding that for the same reasons this should be the 1983 immunity rule as well, the Court mentioned the following additional considerations: the danger to the honest prosecutor from those suits which would survive a pleadings challenge; the virtual retrial of criminal offenses in a new forum, with the resolution of technical cases by the jury; the adverse effect on the criminal justice system because often the finders of fact would be denied relevant evidence; and the availability to the

135. 424 U.S. 409 (1976).

136. 341 U.S. 367 (1951).

137. 386 U.S. 547 (1967).

138. *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (executives) and *Wood v. Strickland*, 420 U.S. 308 (1975) (school board officials exercising quasi-judicial functions).

139. 424 U.S. 409, 410 (1976).

140. *Id.* at 418.

141. *Id.* at 421.

142. Judge Learned Hand wrote of prosecutorial immunity in the much cited case of *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) as follows:

As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

convicted defendant of various post-trial procedures, and to the public of criminal prosecution and professional discipline.

Imbler is expressly limited to those activities of a prosecutor which are "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force."¹⁴³ The Court left open the question of whether *Imbler's* rationale would also apply to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate."¹⁴⁴ It did, however, note that a prosecutor in his role as advocate frequently acts outside of the courtroom as well as in it,¹⁴⁵ thereby suggesting that this role is quite broad and is protected in its entirety by absolute immunity.

The Court also rejected the distinction suggested in the concurring opinion between a prosecutor's knowing use of perjured testimony—to which immunity should attach—and his knowing suppression of evidence—to which the three concurring Justices argued it should not.¹⁴⁶ Further, the Court hinted that a public defender and perhaps even court appointed defense counsel likewise share in absolute immunity when it stated: "Attaining the system's goal of accurately determining guilt or innocence requires that *both the prosecution and the defense* have wide discretion in the conduct of the trial and the presentation of evidence."¹⁴⁷

Prosecutorial Immunity in the Circuits

Since *Imbler*, it is clear that prosecutorial immunity from liability for damages attaches to those acts of the prosecutor in his role as advocate.¹⁴⁸ Not

143. 424 U.S. 409, 430 (1976).

144. *Id.* at 430-31.

145. *Id.* at 431 n.33. Included in the prosecutor's role as advocate, according to the Court, are the following: deciding whether to present a case to a grand jury or to file an information, deciding whether and whom to prosecute, deciding what evidence and witnesses to present, and obtaining, reviewing and evaluating evidence in connection with all the above.

146. Justices White, Brennan and Marshall, concurring in the judgment, reasoned that absolute immunity should not extend to claims of unconstitutional suppression of evidence because to do so would discourage the disclosure of evidence by prosecutors and thereby injure the judicial process as well as the defendant in a criminal case. However, the majority rejected this approach in part because it believed that a claim of using perjured testimony could easily be converted into a claim of suppressing evidence. *Id.* at 432-33.

147. *Id.* at 426 (emphasis added).

148. See, e.g., *Ledwith v. Douglas*, 568 F.2d 117, 119 (8th Cir. 1978) (immunity protects a prosecutor acting in a civil enforcement proceeding to enjoin deceptive trade practices and obtain restitution for defrauded consumers. Although *Imbler* dealt with criminal proceedings, the civil enforcement proceeding in *Ledwith* is functionally comparable to a criminal proceeding. As such, the result in *Ledwith* is sound); *Perez v. Borchers*, 567 F.2d 285, 287 (5th Cir. 1978) (per curiam) and *Jennings v. Schuman*, 567 F.2d 1213, 1221 (3d Cir. 1977) (immunity protects the prosecutor who allegedly conspired to bring false criminal charges against the plaintiff); *Hilliard v. Williams*, 540 F.2d 220, 221 (6th Cir. 1976) (per curiam) (immunity protects a prosecutor who allegedly withheld evidence favorable to plaintiff and instructed a witness to

so clear, however, is where the prosecutor's role as advocate ends and his other roles begin. This was a recurring issue in the circuits before *Imbler* and remains so because *Imbler* expressly left open the question of the scope of prosecutorial immunity in non-advocacy situations.

For example, the prosecutor as *investigator* has been the subject of considerable litigation. In *Robichaud v. Ronan*,¹⁴⁹ a much quoted pre-*Imbler* decision which involved a prosecutor accused of various attempts to intimidate the plaintiff while in custody to confess to a murder she didn't commit, despite the lack of probable cause to hold her, the Ninth Circuit held that the investigative activities of a prosecutor are protected only by a qualified immunity.¹⁵⁰ The Seventh Circuit, in another pre-*Imbler* case, *Hampton v. City of Chicago*,¹⁵¹ explicitly used the *Robichaud* approach to reject the prosecutors' claim of absolute immunity. In *Hampton*, plaintiffs' complaint could have been read as alleging that the prosecutors and others had conspired to plan and execute a raid in order to kill certain members of the Black Panther party. The court read the complaint more narrowly as alleging the planning and execution of the raid in order simply to obtain evidence. Still, the court rejected the contention that "evidence gathering is so closely related to the presentation of evidence at trial that it should also be clothed with immunity."¹⁵²

A recent post-*Imbler* district court decision followed *Robichaud* and *Hampton* in holding that absolute immunity was not available to a prosecutor who allegedly forced the plaintiff to become a police agent and informant through threats and coercion.¹⁵³ The court simply characterized this activity

testify evasively, if not falsely); *Bruce v. Wade*, 537 F.2d 850, 852 (5th Cir. 1976) (immunity protects a prosecutor who allegedly improperly had the plaintiff indicted and, at the trial, suborned perjury and filed false affidavits); *Flood v. Harrington*, 532 F.2d 1248, 1251 (9th Cir. 1976) (immunity protects government attorneys involved in litigation in connection with the collection of income taxes. Although *Flood* was not a 1983 case, *Imbler's* reasoning was found applicable).

149. 351 F.2d 533 (9th Cir. 1965).

150. The court reasoned as follows:

We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? . . . To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.

Id. at 536-37. *Robichaud* relied on the earlier similar case of *Lewis v. Brantigam*, 227 F.2d 124 (5th Cir. 1955), in which the defendant prosecutor allegedly attempted to coerce a guilty plea from a criminal charge. The Fifth Circuit held that prosecutorial immunity does not extend to such investigative activity.

151. 484 F.2d 602 (7th Cir. 1973).

152. *Id.* at 609.

153. *Tomko v. Lees*, 416 F. Supp. 1137 (W.D. Pa. 1976).

as "of a police/investigative nature,"¹⁵⁴ However, *Imbler* casts some doubt upon the propriety of a "bright line" test which simply asks whether the activity is of the kind in which police engage.¹⁵⁵

In addition to the investigatory role of prosecutors, courts have distinguished the advocacy role from still other prosecutorial activities.¹⁵⁶ The District of Columbia Circuit held, albeit in a non-1983 case, that the U.S. Attorney General's role in directing law enforcement activity was not absolutely protected from liability for damages for alleged Fourth and Fifth Amendment violations.¹⁵⁷ The prosecutor's role as advocate has also been distinguished from situations in which a corporation counsel allegedly failed to issue an advisory opinion which would have permitted plaintiff to speak at a public gathering.¹⁵⁸ A similar conclusion was reached when a prosecutor sent a critical letter to a legislative investigating committee, with copies to the press, about the plaintiff against whom a murder charge had been dismissed and no judicial proceedings were pending or contemplated.¹⁵⁹ It was stated in these post-*Imbler* cases that there was no judicial or quasi-judicial significance to the defendants' conduct. A pre-*Imbler* Ninth Circuit case reached a similar conclusion about an allegedly wrongful advisory opinion given by a city attorney which resulted in plaintiff's discharge from his job.¹⁶⁰ The court refused to extend absolute immunity "to a lawyer in a public law office giving legal advice to a public entity in respect of matters that are not the subject of pending litigation. The purpose of according judicial immunity is to protect the integrity of the judicial process . . . not to shield lawyers . . . when the alleged invasion did not occur during the performance of acts that are an integral part of the judicial process."¹⁶¹

The Third Circuit recently noted what it called the "thorny issue" of prosecutorial immunity in connection with still another prosecutorial role: the defendant's firing of plaintiff, his first assistant, for publicly contradicting him

154. *Id.* at 1139.

155. In a possibly significant footnote, the Supreme Court observed:

We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom . . . *Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing and evaluating of evidence . . .*

Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

424 U.S. 409, 431 n.33 (emphasis added). This language strongly suggests that the Court realizes both that prosecutorial functions may overlap and that the scope of the prosecutor's role as advocate is quite broad. If it is taken literally, then the prosecutorial activities in *Robichaud* and *Hampton* may be outside the scope of 1983 liability for damages.

156. A commentator categorized the various roles as follows: executive, ministerial, investigatory, civil/advisory, public official and individual. Note, *Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits*, 52 N.Y.U.L. REV. 173, 187-188 (1977).

157. *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

158. *Shifrin v. Wilson*, 412 F. Supp. 1282 (D. D.C. 1976).

159. *Cahalan v. Walker*, 542 F.2d 681 (6th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977).

160. *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970).

161. *Id.* at 743.

about his role concerning a concluded criminal case.¹⁶² The defendant argued "that prosecutorial immunity should be held to cloak administrative actions such as the discharge involved here. The hiring and firing of the subordinates through whom he acts . . . is the District Attorney's ultimate discretionary act in his service to the public. . . ."¹⁶³ But the court avoided being "pricked", and ruled against plaintiff on the merits. It would appear, though, that the defendant's act was clearly administrative and not taken in his role as advocate. Just as a legislator's discharge of an employee was held not protected by a legislator's absolute immunity, because it was not a legislative act,¹⁶⁴ so too in all likelihood would this defendant's conduct be unprotected by a prosecutor's absolute immunity because it was not an advocate's act.

Situations may arise in which the prosecutor is found to have acted not as a prosecutor, but rather as an individual. A 1977 Third Circuit decision indicated that a special prosecutor without authority to act as prosecutor in the plaintiff's case would not be absolutely immune from liability for damages arising from a claim that he had conspired with others to bring false criminal charges against the plaintiff.¹⁶⁵ In another Third Circuit decision that same year, the plaintiff, a former congressman, sued a United States Attorney for allegedly attempting to destroy him politically by deliberate leaks to the press of false information in connection with grand jury proceedings.¹⁶⁶ In holding that the defendant was protected only by a qualified immunity, the court left open the scope of prosecutorial immunity in a nonadvocate context. Instead, the court found that the allegations of deliberate leaks not only went beyond the advocate's role but also exceeded that of the prosecutor as investigator and administrator.¹⁶⁷ The court failed to mention the prosecutor's role as a public official who is accountable to the public at large.

This concern with the varied roles of the prosecutor is unique. Unlike legislators and judges whose exposure to potential liability will generally arise in connection with either legislating or judging, the prosecutor not only prosecutes, but investigates, administers, executes and the like. His exposure to potential liability will arise in varied situations which seem to admit of no straightforward immunity approach which is relatively easy to apply.¹⁶⁸ Therefore, to the extent that *Imbler's* rationale is tied to the prosecutor's broadly construed role as advocate and is based on a concern with

162. *Sprague v. Fitzpatrick*, 546 F.2d 560, 564 (3d Cir. 1976).

163. *Id.* at 564.

164. *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977). See notes 29-32 and accompanying text *supra*.

165. *Jennings v. Shuman*, 567 F.2d 1213 (3d Cir. 1977).

166. *Helstoski v. Goldstein*, 552 F.2d 564 (3d Cir. 1977) (*per curiam*) (United States Attorney).

167. *Id.* at 566.

168. If, for example, a "jurisdiction" approach were taken, comparable to that for judges, then absolute immunity would extend to all the traditional prosecutorial roles. Whatever difficulties the "jurisdiction" approach presents, and there are many, see notes 57-134 and accom-

independent decision making, retrying criminal offenses and the adverse impact on the criminal justice system, distinctions will inevitably have to be drawn between this role and all the others. If, however, the policy underlying *Imbler's* rationale is based more on protecting honest prosecutors and avoiding the diversion of a prosecutor's attention, then so long as the prosecutor is acting within a traditional prosecutorial role,¹⁶⁹ he will be accorded an absolute immunity. It is a fair prediction that at least the prosecutorial role of investigator will be accorded absolute immunity and assimilated into the advocate's role, in part because of the difficulty in drawing a satisfactory line between the prosecutor as advocate and as investigator where there are pending or contemplated criminal matters. The Supreme Court may eventually hold that if absolute immunity for prosecutors is to be effective, a prosecutor should not have to guess whether what he is doing is advocative or investigative.¹⁷⁰

Regardless of where the *Imbler* absolute immunity line is drawn, it is clear that one of the major purposes of absolute immunity is to avoid implicating the merits of the allegations of unlawful conduct against a prosecutor. Thus, the reasoning in pre-*Imbler* cases about prosecutorial conduct which is "clearly beyond the proper exercise of his authority and exceed[ing] any possible construction of the power granted to this office"¹⁷¹ is no longer to be followed. It improperly focuses on the unauthorized or *ultra vires* nature of the conduct and not on the role of the prosecutor. Such reasoning led to a result in a 1974 Seventh Circuit decision which is also now clearly incorrect after *Imbler*.¹⁷² There, the refusal of a prosecutor to assist the plaintiff in regaining his property by prosecuting those unlawfully possessing it was characterized as outside the scope of the prosecutor's duties and illegal and hence protected by qualified immunity only.

Consequently, it is surprising that the Ninth Circuit recently used this very approach in a post-*Imbler* case. *Briley v. State of California*¹⁷³ was a 1983 action for damages brought against a trial judge, prosecuting attorneys and others for alleged violations of the plaintiff's constitutional rights. The plaintiff had been charged with child molestation but was offered the opportunity to plead guilty to a lesser offense provided he consent to castration. The plaintiff consented to this surgery even though the plea bargain was never recorded and a court order was never entered approving it. As to the

panying text *supra*, it seems somewhat easier to apply in many situations than an approach to prosecutorial immunity which focuses on a particular role.

169. This includes the role of an administrator or investigator acting within his "jurisdiction," by analogy to the judiciary.

170. Compare *Stump v. Sparkman*, 435 U.S. 349 (1978), in which the Court indicated that a judge's jurisdictional errors are to be treated the same as other legal errors for purposes of absolute judicial immunity.

171. *Martin v. Merola*, 532 F.2d 191, 195 (2d Cir. 1976) (Lumbard, J., concurring) (per curiam).

172. *Holton v. Boman*, 493 F.2d 1176 (7th Cir. 1974).

173. 564 F.2d 849 (9th Cir. 1977).

immunity issue, the plaintiff argued that there was no legal authority whatever for district attorneys to require castration and therefore absolute immunity was inappropriate. Agreeing with this approach to prosecutorial immunity, the Ninth Circuit remanded to determine whether the state trial judge "would have arguably had some common-law or statutory basis for ordering Briley to submit to castration had he been convicted for the child molestation charge. If such authority is found and, thus, judicial immunity attaches, the district attorneys . . . would be immune from §1983 liability for misrepresentations. . . ." ¹⁷⁴ The court cited the Seventh Circuit opinion in *Stump v. Sparkman* (prior to reversal by the Supreme Court) ¹⁷⁵ and the district court decision in *Wade v. Bethesda Hospital* ¹⁷⁶ as "persuasive authority that a court, at least when ordering the extreme remedy of sterilization, must have specific legislative or common-law authority for doing so," ¹⁷⁷ and then made the district attorneys' immunity dependent on the judge's.

After *Imbler*, however, and even without the Court's decision in *Stump*, it is clear that district attorneys should be immune when they act as advocates in connection with a specific criminal case. To make their immunity dependent solely upon the judge's not only misdirects the inquiry but also, to the extent it focuses on statutory or common law authority, necessarily implicates the merits. Yet *Imbler* was designed to preclude just such an inquiry where a prosecutor acts as an advocate. Furthermore, the Court's decision in *Stump* now makes abundantly clear that the "legislative or common law authority" approach to judicial immunity is wrong. Consequently, *Briley's* approach is similarly incorrect.

It should be noted, finally, that this discussion of *Imbler* and its reception in the circuits is limited to prosecutorial immunity for liability for damages. For reasons similar to those discussed earlier in connection with injunctive relief against legislators and judges, ¹⁷⁸ it is likely that injunctive relief is also available even after *Imbler* against prosecutors in appropriate situations. ¹⁷⁹ A post-*Imbler* Third Circuit decision broadly stating the contrary in connection with the plaintiff's request for injunctive relief against a prosecutor appears incorrect. ¹⁸⁰ Because there the plaintiff sought to have his conviction set aside, the case is better treated more narrowly as one in which the prosecutor did not have authority to grant the requested relief.

174. *Id.* at 858.

175. *Sparkman v. McFarlin*, 552 F.2d 172 (7th Cir. 1977), *rev'd sub. nom.* *Stump v. Sparkman*, 435 U.S. 349 (1978).

176. 337 F. Supp. 671 (S.D. Ohio 1971).

177. 564 F.2d at 854.

178. See notes 52-56, 124-133 and accompanying text *supra*.

179. The Supreme Court has, however, expressed reservations about injunctions which appear either to interfere unnecessarily with a prosecutor's discretion, *O'Shea v. Littleton*, 414 U.S. 488 (1974), or to impinge upon comity concerns. See generally note 132 *supra*.

180. *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976).

The Immunity of Public Defenders

The circuits discussing the immunity of public defenders have generally concluded that they, like prosecutors, are protected by absolute immunity in their role as advocates. A significant pre-*Imbler* decision of the Third Circuit, *Brown v. Joseph*,¹⁸¹ which involved an allegedly improperly induced guilty plea, justified this result on the ground that assuming prosecutors and public defenders act in analogous although opposite roles, the policies sought to be achieved by prosecutorial immunity apply to public defender immunity as well.¹⁸²

In two post-*Imbler* cases involving claims that public defenders had breached a plea bargain and had failed to respond to requests for help in connection with the preparation of a habeas corpus petition, the Fourth and Ninth Circuits¹⁸³ followed *Brown* and the clear implication of the Court's language in *Imbler* regarding the need for broad trial discretion for "both the prosecution and the defense."¹⁸⁴ They accordingly held that public defenders are protected by absolute immunity. The Seventh Circuit's contrary result in a pre-*Imbler* case¹⁸⁵ was always suspect, because it both relied on a qualified immunity rule for prosecutors¹⁸⁶ and misread the Third Circuit's decision in *Brown*.¹⁸⁷ It has now been expressly repudiated by the Seventh Circuit.¹⁸⁸ The trend therefore is to apply absolute immunity to both prosecutors and public defenders. It is worth noting, however, that the previously discussed line drawing problems relating to different prosecutorial roles will similarly arise in connection with public defenders.

181. 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

182. The court stated:

We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders . . . [This reflects] a public policy encouraging free exercise of professional discretion in the discharge of pre-trial, trial and post-trial obligations . . .

There are other considerations of public policy. First, there is the desirability of encouraging able men and women to assume Public Defender roles Moreover . . . if a civil rights suit . . . is a constant threat to the Attorney involved, then there would be a chilling effect upon Defense Counsel's tactics. Defense Counsel would be caught in an intrinsic conflict of protecting himself and representing his client.

Id. at 1048-49.

183. *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977); *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976).

184. 424 U.S. at 426. The Fourth and Ninth Circuits mentioned additional concerns with frivolous claims by inmates, the use of defender time to defend against such claims when other inmates need help, and the effect of 1983 litigation on the limited resources of public defender agencies.

185. *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973) (per curiam).

186. *Id.* at 788.

187. *Id.*

188. *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978) (per curiam). This decision also exhaustively discussed a troublesome state action issue and concluded that state action was present. See generally A GUIDE TO SECTION 1983 chapter 2.

CONCLUSION

Of the Supreme Court's three 1983 absolute immunity cases, the one most worth pondering is *Imbler v. Pachtman* which extended absolute immunity to prosecutors. Legislators and judges are *sui generis* and both as a matter of historical background and 1983 policy, their absolute immunity is understandable. Furthermore, 1983 remains largely intact despite this absolute immunity. In *Imbler*, however, the Court seems to have embarked on a policy oriented approach to absolute immunity in which 1983 policy gets lost in the shuffle. This approach, though, downplays the "person" language of 1983 which must be broadly construed if 1983 liability is to have an effect on official conduct. Moreover, this "person" language indicates that Congress already made the policy determination that most individuals are "persons" for 1983 purposes. Furthermore, to the extent that the issue arises in the future, it may prove unworkable to draw a line around the prosecutor and stop there. As was seen, public defenders are the next likely candidates for absolute immunity protection, and there may be others.

On the other hand, the Court may ultimately limit the absolute immunity categories to state legislators, judges and prosecutors and public defenders involved in criminal trials. This would narrow the scope of 1983, but not significantly undercut it, because all other individuals not involved in legislating, judging, or trying criminal cases would still be considered "persons" for 1983 damages liability purposes. What the Supreme Court will in fact do remains to be seen.¹⁸⁹

189. As this Article went to print, the United States Supreme Court decided *Lake County Estates v. Tahoe Regional Planning Agency*, no. 7-1327 (U.S. Sup. Ct. 1979). Although the opinion has not been published, the Court held that absolute immunity under the Eleventh Amendment is applicable to local and regional legislatures. See notes 44-56 and accompanying text *supra*.